IT'S THE HARD LUCK LIFE: WOMEN'S MORAL LUCK AND EUCATASTROPHE IN CHILD CUSTODY ALLOCATION

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I. INTRODUCTION

Deciding the custody of a child, especially when that determination is between separated parents, is one of the most contentious, emotional, economic, and legal issues facing parents. Such allocations of child custody between parents sometimes present special burdens for women.[1] This is partially because children create specific fields of power relations between parents or surrogate parents.[2] These power relations give rise to subsequent power claims that are linked to the question of gender.[3] Hence, the nature of power claims available to women-as-mothers are sometimes quite different from the power claims available to men-as-fathers.[4]

Moreover, it has been argued that even with the growing normativity of shared parenting between men and women and the expansion of father-only parenting, maternal caring has remained a central feature of many modern child custody arrangements.[5] Hence, the potential for shared and father-

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[1] This observation, and much of the discussion that follows in this paper, proceeds on the assumption that separating parents are a male-female couple. There are, of course, separated same-sex parent couples that face many of the issues discussed here. Same-sex parent couples may also encounter a host of other challenges in the judicial allocation of child custody, beginning with the difficulty of raising such matters before courts. Some research has suggested that even openly gay and lesbian couples may feel uncomfortable bringing child custody matters in courts, and either eschew courts in lieu of private mediation or adjudication or keep their sexuality closeted before courts. *See* Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 173-74, 186-87 (2007).

[2] *See* Carol Smart, *Power and the Politics of Child Custody, in* CHILD CUSTODY AND THE POLITICS OF GENDER 1, 2 (Carol Smart & Selma Sevenhuijsen eds., 1989).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 22.

only parenting has sometimes been framed as a means of addressing deficits in maternal caring.[6] This particular discursive framing has sometimes resulted in greater male control not only over children's lives, but also over mothers' lives.[7] In some cases, judicial rhetoric that addresses father-only or father-primary custody has even appropriated tropes of mothering and procreation to a masculine ethos. Such rhetoric has, as one scholar has written in another context, allowed fathers to become "wives unto themselves."[8] This type of judicial rhetoric is also, at times, a site for the crafting of new familial regulatory mechanisms with which to manage the changing social geography of motherhood.

It has been argued that there is a certain taken-for-grantedness about the power claims of men and women in the context of child custody, and that this power often exists unacknowledged in parenting relationships until a conflict arises.[9] Additionally, there is a structuring to this power that is first deployed in the private sphere of the home, but is also more largely imbricated in structures outside of the home, especially in the state, and most particularly, in legal settings. The law has numerous mechanisms for deploying power. Noteworthy among them is the legal discursive construction of the conflict itself and of the parties to the conflict. In the wielding of discursive power in the allocation of child custody, the "best interests of the child" is, and has been for several decades, the ever-present catchphrase over the last several decades in the United States.[10]

All too often, assessments of a child's "best interests" become mechanisms for structuring and maintaining existing gender based power relations.[11] Even though rules and norms that exist to protect children may be well-intended or well-founded, it still must be acknowledged that norms such as the best interests standard may cause as many difficulties as they resolve. It has long been asserted that the best interests standard is sometimes vague and variable, therefore offering little guidance for courts or parties.[12] Indeed, it has been argued that the best interests standard is

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[6] *Id.*

[7] *Id.*

[8] *See* LAURA DOYLE, BORDERING ON THE BODY: THE RACIAL MATRIX OF MODERN FICTION AND CULTURE 125 (1994). Doyle writes within the context of literary and cultural narratives about maternity and specifically about the "race mother." *See generally id.*

[9] "Taken for grantedness" describes formulations by which certain propositions are accepted as broadly understood, agreed upon or shared, and thus generating no conflict or disagreement. Anne-Marie Simon-Vandenbergen, Peter R.R. White & Karin Aijmer, *Presupposition and 'Taking-for-Granted' in Mass Communicated Political Argument: An Illustration from British, Flemish and Swedish Political Colloquy*, *in* POLITICAL DISCOURSE IN THE MEDIA: CROSS-CULTURAL PERSPECTIVES 31, 32 (Anita Fetzer & Gerda Eva Lauerbach eds., 2007).

[10] *See* Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America, 290 (1985).

[11] *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV 727, 727 (1988).

[12] *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978 (1978) ("Under the best interests principle the outcome in court

purposefully vague, and that this vagueness allows a court to address the specific needs of each family coming before it.[13] One response to such claims has been the development of standards such as the American Law Institute's "approximation principle" in which custody is based on an approximation of parental behavior and especially parental caretaking prior to the separation.[14] This standard, however, is subject to the same criticism as the best interests standard, as it offers little more clarity.[15]

The best interests test, as well as the approximation principle and other similar tests, all suffer from many of the same flaws. First, these standards, even where they may be helpful in reshaping the norms of parenting, are all too often premised on the competing concerns and merits of parents.[16] Such standards may also rely on the valorization of parental attributes that may mean little in the child's day-to-day experience or overall welfare.[17] Next, these tests do little to resolve conflicts about the actual history of parent-child relations and do not allow for the assessment of the possibility of parental growth or change. Finally, standards such as the best interests test rely upon claims of a prevailing neutrality in such matters. The notion of claiming neutrality in such an arena is troubling where, by necessity, there must be a "best" or "preferred" outcome for the child.[18] Claims of neutrality and procedural fairness in the context of child custody are often premised upon the development of lists of specific factors that courts must consider in making child custody allocations. Several jurisdictions have included within the list of factors "the moral fitness" or "character" of the parent, while other jurisdictions address the morality of the parent in other similar terms.[19] Such assessments of morality and character, especially in the context of child custody, raise special problems for women.

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will often be uncertain: each spouse may be able to make a plausible claim for custody, and it may be impossible to predict how a court would decide a disputed case.").

[13] PHILIP M. STAHL, CONDUCTING CHILD CUSTODY EVALUATIONS: FROM BASIC TO COMPLEX ISSUES 34-35 (2011).

[14] *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (2002) [hereinafter ALI PRINCIPLES 2002]; *see also* ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 167 (2004); STAHL, *supra* note 13, at 35.

[15] *See, e.g.*, Robert J. Levy, *Custody Law and the ALI's PRINCIPLES: A Little History, a Little Policy, and Some Very Tentative Judgments, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 67, 67-70 (Robin Fretwell Wilson ed., 2006).

[16] For instance, some scholars have advocated for a model of child custody allocation that avoids a "status-based definition of fatherhood" and acts instead to "reinforce and recast its prior fathers' rights decisions to establish a definition grounded on relationship and care." Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1275 (2005). Such a model would still, by necessity, pit parents against each other.

[17] *See* SCHEPARD, *supra* note 14, at 167-68; JOHN T. PARDECK, CHILDREN'S RIGHTS: POLICY AND PRACTICE 24 (2d ed. 2006).

[18] *See generally* Gerald Dworkin, *Non-Neutral Principles*, 71 J. PHIL. 491 (1974).

[19] *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 621-22 (1992).

Particularly of concern under the rubric of morality is when courts engage in redemptive morality discourses, that is, discussions about conditions that allow women to be revealed as or to be constructed as "good mothers." In some cases, especially those where women succeed in obtaining custody of their children, there are what J.R.R. Tolkien termed "eucatastrophic" endings.[20] Tolkien coined the term "eucatastrophe" in his discussion of fairy stories.[21] It refers to a "good catastrophe," the sudden, joyous turn of events at the end of a story that results in the protagonist's well being.[22] While in its most basic terms eucatastrophe is the proverbial "happy ending," it represents the opposite—it is a new beginning, not an ending.[23] According to one scholar, achieving eucatastrophe involves "recovery" and "restoration," which is a process of "defamiliarization of the known world to better appreciate its qualities."[24] Sexually misbehaving mothers arguably experience that process of defamiliarization when they leave the bounds of good motherhood. Such mothers recover and are restored when they attain redemption by recommitting themselves to "good motherhood" and performing their roles according to prevailing social norms.

In this paper, I discuss the legal discursive construction of child custody allocation between separated parents and the role of child custody in discursively constructing motherhood. In shaping this discussion I first offer a brief history of the discourse surrounding the allocation of children between separated parents in Anglo-American jurisprudence. I then consider the "moral fitness" rubric in child custody adjudications, especially as it concerns marital sexual misconduct. Next, I consider whether moral fitness is a legitimate ground for assessing parental fitness, given the existence of what some scholars have termed "moral luck"—the notion that the ability to act according to prevailing moral standards may be contingent on factors outside of the actor's control. Finally, I suggest that assessments of women's moral fitness in child custody allocations may sometimes have to do with whether the structuring of events in their lives creates a *eucatastophe*: a moment where problems are vanquished and protagonists can begin their quests anew. I offer as an example of the deployment of the moral fitness standard the case of *Burris v. Burris*,[25] and consider how moral luck and eucatastrophe are seen via the discursive frames that operate in that case.

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[20] *See* Christopher Garbowski, *Eucatastrophe*, *in* J.R.R. TOLKIEN ENCYCLOPEDIA: SCHOLARSHIP AND CRITICAL ASSESSMENT 176, 177 (Michael D.C. Drout ed., 2007).

[21] *Id.* at 176.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 388 N.E.2d 811 (Ill. App. Ct. 1979).

II. MOTHERING DRAMA, MOTHERING TRAUMA: THE LEGAL DISCURSIVE CONSTRUCTION OF CHILD CUSTODY ALLOCATION BETWEEN SEPARATED PARENTS

The allocation of child custody during parental separation provides almost a textbook illustration of the potential for both the drama and the trauma of mothering. In the dominant imagination, the very idea that a mother would lose custody of her child bespeaks failure not only in the mothering role, but also in the womanly role. This is true because women's thoughts and personal codes have traditionally been said to be developed within the domain of the family, where relationships and the needs of others rather than self-interest are the crux of feminine identity formation.[26] The proliferation of the discourse of maternal caring has occurred even in the face of widespread articulation of modern, purportedly gender-neutral standards for the allocation of custody. As one scholar asserted:

> In most contested child custody determinations, men are on one side and women are on the other; yet, the cases are decided as if gender had nothing to do with the law that governs them. The "best interests of the child" standard, the one most commonly applied, is generally considered to be gender-neutral, hence sex equal.[27]

These instances of both drama and trauma are frequently reflected in courtroom discourses concerning child custody. Because of the power inscribed in the judicial process, the allocation of child custody has become a potent site for the reification of longstanding myths and ideologies about the nature of maternal versus paternal care. These myths began in early common law times and persist even in modern times, despite significant changes in law and in discursive representations of law in the context of child custody.

Under early English common law, mothers had little power or control over their children.[28] Fathers possessed absolute custodial rights over their children, or at minimum, paramount rights to custody.[29] Some scholars have asserted that this stemmed from notions of the father's innate biological superiority as a guardian.[30] As one treatise described it, "the

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[26] Wendy Brown, *Finding the Man in the State*, *in* THE ANTHROPOLOGY OF THE STATE: A READER 187, 196 (Aradhana Sharma & Akhil Gupta eds., 2006).

[27] CATHARINE MACKINNON, SEX EQUALITY 628 (2001).

[28] DOROTHY A. MAYS, WOMEN IN EARLY AMERICA: STRUGGLE, SURVIVAL, AND FREEDOM IN A NEW WORLD 70 (2004).

[29] JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 337 (3d ed. 1882). *See also* JOAN PERKIN, WOMEN AND MARRIAGE IN NINETEENTH-CENTURY ENGLAND 14-15 (1989).

[30] *See, e.g.*, 1 J.H. THOMAS, SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 122 (1836).

father hath the *first* title to guardianship by nature, the mother the second."[31] This was premised largely upon a father's legal obligations for his children.[32] As early United States law was based on English law, fathers seeking custody of children in early United States courts were in much the same position as fathers in English courts.[33] However, as one scholar has noted, while the outcome of child custody claims between mothers and fathers was often the same in England and the United States in these earlier times, there was a distinction in the rationale given.[34] English law gave fathers custody because of their *superior rights as parents*, whereas early United States courts often gave fathers custody because of their *superiority as guardians*.[35] The distinction in the rationales offered by courts is noteworthy, as one rationale speaks to the father's inherent entitlements or permissions of parenthood (superiority of rights) and the other addresses his capacity as a parent (superiority as guardians). It is instructive to briefly address the discursive nature of the claims being made in each instance.

The English superiority of rights approach asserts that fathers had, by nature, paramount rights over children.[36] Although this did not translate to absolute power over children, as was the case under ancient Roman law,[37] it meant that the father had, for example, the right of association and could therefore retain personal custody of the child or send the child to live with whomever he pleased.[38] The father's rights also extended to devising custody and control of a child by will upon the father's death, even where the mother was still alive and herself desired custody.[39] In contrast, early English law gave the mother almost no authority over her children.[40] Rather, the mother was entitled to "reverence and respect" only.[41]

The superiority as guardians approach to giving father's rights to children in early United States cases would seem to be a move in the direction of considering the interests of children. This change in discourse is striking, as it heralds a move from being to doing—a transition from the centrality of parental status and ascribed parental rights in parental identity

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[31] *Id.*

[32] Joan B. Kelly, *The Determination of Child Custody,* 4 FUTURE CHILDREN 121, 121 (1994)

[33] *See* DEBRA FRIEDMAN, TOWARDS A STRUCTURE OF INDIFFERENCE: THE SOCIAL ORIGINS OF MATERNAL CUSTODY 28-29 (1995).

[34] *See id.* at 60.

[35] *Id.*

[36] THOMAS, *supra* note 30, at 122.

[37] Ancient Roman law allowed fathers to put their own children to death. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *452 (William Draper Lewis ed., 1902). This proviso was softened by subsequent Roman constitutions. *See id.*

[38] MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 14 (1994).

[39] *Id.* at 3.

[40] BLACKSTONE, *supra* note 37, at *453.

[41] *Id.*

formation to the centrality of parental appropriateness of action and parental ability in the process of parental identity framing.[42] The superiority as guardians approach gradually changed to give both mothers' and fathers' claims to custody of the children of divorce or separation as the standard became the now iconic and seemingly ever-present "best interests of the children" test.[43]

It may be argued that these child-centric norms, present everywhere from schools to mental health treatises to courts, were and are mechanisms to regulate women and to require them to subjugate their needs and desires to those of children and families. Consider, for example, how the move towards a child-centric discourse in matters of child welfare, including custody allocation, has often meant that "nurturing," "sensitive" mothers are expected to avoid stringently regulating the child and to yield in overt battles of the will between the mother and the child.[44] Some scholars argue that this shift to a child-centered, best interests of the children standard that allows for the possibility of maternal custody occurred chiefly because the labor of children became less important to family economy in the late 19th and early 20th centuries.[45] Hence, granting one parent primary custody of children was no longer deemed a financial loss to the noncustodial parent.[46] Indeed, as child labor has become less common and more restricted, it is increasingly the case that the primary custodial parent bears an added financial burden, not a benefit.[47] This shift to a child-centered standard is also sometimes attributed to a parallel movement assigning children an emotional value and romanticizing the role of the mother.[48]

In more modern cases, those occurring in the middle and even late 20th century, the best interests of the child standard often translated into a preference for the mother in custody matters involving small children or female children.[49] The practical position of many courts, even those ostensibly embracing norms of equality dictated by formal law, was to allow the mother the *prima facie* right to custody.[50] Some reasons for favoring the mother in custody cases include traditional notions of the

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[42] *See, e.g.*, John R. Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 U. CHI. L. REV. 47 (1967).

[43] KATHLEEN KELLEY REARDON & CHRISTOPHER T. NOBLET, CHILDHOOD DENIED: ENDING THE NIGHTMARE OF CHILD ABUSE AND NEGLECT 86-87 (2009).

[44] *See, e.g.*, VALERIE WALKERDINE & HELEN LUCEY, DEMOCRACY IN THE KITCHEN: REGULATING MOTHERS AND SOCIALIZING DAUGHTERS 23-24 (1989).

[45] REARDON & NOBLET, *supra* note 43, at 87.

[46] *Id.*

[47] *See generally* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004).

[48] REARDON & NOBLET, *supra* note 43, at 87.

[49] REARDON & NOBLET, *supra* note 43, at 91.

[50] One study of Louisiana judges found disagreement among judges on a number of issues in allocations of child custody, but one issue on which almost all agreed was the preference for awarding custody to mothers. Leighton E. Stamps et al., *Judges' Beliefs Dealing with Child Custody Decisions*, *in* CHILD CUSTODY: LEGAL DECISIONS AND FAMILY OUTCOMES 3, 3-5 (Craig A. Everett ed., 1997).

mother's role in caring for the child and assumptions that she is better fitted to attend to the needs of children, especially young children and females.[51] Very recent practice has, however, seen a shift in judicial preference, as most United States courts have explicitly disavowed what is known as the "tender years doctrine."[52] This has meant a move towards a theoretically more even-handed approach in assessing the parent to whom residential custody should be assigned.[53] This translates into an embrace of dual, often overlapping standards for primary custody of children.[54] The best interests of the child and the relative fitness of the parents work in tandem to determine allocation of child custody whether as between two parents or between parents and other parties.[55]

There are, not surprisingly, a number of factors that may be considered when assessing the relative fitness of the parents to have the custody of their minor children.[56] Perhaps one of the most contentious factors is whether or the extent to which the parent seeking custody has engaged in immoral behavior.[57] Morality is a fluid concept that has both descriptive and normative dimensions. However, it is all too often wielded with great normative force, and in this regard acts as what one scholar has called a "non-neutral principle."[58] Moreover, even assuming some general agreement on the warrants of morality, questions may arise regarding the

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[51] *See id.* at 4.

[52] The "tender years doctrine" is a longstanding notion asserted by society and the courts that women were the best caretakers for very young children, those said to be of "tender years." ROBERT E. EMORY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 73 (1994). This was chiefly based upon beliefs about women's innate capacities as nurturers and caretakers. *Id.; see also* Stamps et al., *supra* note 50, at 4; ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 7 (1992).

[53] *See* Stamps et al., *supra* note 50, at 4. Despite such changes, the common perception remains that women are more frequently the winners in custody proceedings, even when men are equal or more involved caregivers. *See* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 967–76 (2005). Data suggests both bias in favor of and bias against fathers in custody awards. NANCY E. DOWD, REDEFINING FATHERHOOD 141–42 (2000).

[54] *See* Stamps et al., *supra* note 50, at 4-6.

[55] *Id.*

[56] *Id.* at 5-6.

[57] *Id.* at 6.

[58] Dworkin, *supra* note 18. Dworkin describes non-neutral principles as those principles appealed to under conditions where there are persons:

> (1) who propose to act in ways that restrict the liberty of others or take more liberties than others on the basis of moral and political beliefs; (2) who are then faced with the challenge of inconsistency insofar as they are not prepared to let others act as they do; and (3) who meet the challenge by providing a principle they are prepared to let anyone act on.

Id. at 492. Non-neutral principles are held up as norms but are themselves contested. An example given by Dworkin is where the principle supported by the state is "censor false views." *Id.* at 492. *See also* Alex Tuckness, *Legislation and Non-neutral Principles: A Lockean Approach,* 8 J. POL. PHIL. 363, 364. This is a contested or non-neutral principle because "whether the view is actually false is precisely what is in dispute between the two parties." *Id.* at 364. *See also* Dworkin, *supra* note 18, at 499-501. Frequently principles that purport to justify state-enacted coercion are non-neutral in this way. *Id.*

moral standing of an agent—the right of an agent to enact norms regarding morality, and whether that right is contingent upon the extent to which the challenged behavior is public or private.[59] In many instances "immorality" is synonymous with deemed sexually inappropriate behavior, especially female sexual behavior.[60] This has especially been the case in the context of child custody.

Despite the fact that "moral fitness" is a factor to consider in many custody matters, generally stated, moral lapses such as adultery must be shown to have a present adverse effect on the child in order for the misconduct to be relevant.[61] An allegation of sexual impropriety is not an independent factor automatically barring an award of custody to the parent found guilty of marital misconduct.[62] Courts have held that the fact that one parent committed marital misconduct which itself was a basis of a divorce decree in favor of the other parent may, but does not necessarily, constitute a reflection on the guilty parent's fitness to have the custody of the child.[63] However, it becomes clear in reviewing cases regarding the general assessment of parental fitness in the face of allegations of sexual impropriety that judges' morals and values may be a significant factor in how facts are assessed.[64]

Indeed, for much of the history of family law in the United States, judges wielded broad discretion in such matters, thereby establishing what one scholar has called a "judicial patriarchy": the social defense of masculinity and male norms via the courts and social welfare mechanisms.[65] In such matters, judges became both the bulwarks and the referees between the family and the state.[66] The effect of judicial patriarchy

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[59] Gerald J. Postema, *Public Faces-Private Places: Liberalism and the Enforcement of Morality, in* MORALITY, HARM, AND THE LAW 76, 81-83 (Gerald Dworkin ed., 1994).

[60] *See* Estelle B. Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HIST. 83, 87 (1987).

[61] Hartley v. Hartley, 355 S.E.2d 869, 872 (S.C. Ct. App. 1987) (citing Davenport v. Davenport, 220 S.E.2d 228, 230 (S.C. 1975)).

[62] *See* Stamps et al, *supra* note 50, at 7.

[63] For a discussion of the relationship between sexual behavior and immorality in the context of child custody, *see* MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 86-87 (1997).

[64] *See, e.g.*, VanName v. VanName, 419 S.E.2d 373 (S.C. Ct. App. 1992). In *VanName*, a husband committed adultery before the couple's divorce, and continued his illicit relationship after the couple's divorce. *Id.* at 373. The husband admitted that he allowed the lover overnight visits but denied that the visits were conducted while the children were visiting. *Id.* at 374. Nonetheless the appellate court affirmed a denial of change of custody to the husband, who had sought custody because of the mother's proposed move. *Id.* at 374-75. In affirming custody in the mother, the appellate court cited the father's illicit involvement. *Id.* In contrast, in Ford v. Ford, 419 S.E.2d 415, 416 (Va. Ct. App. 1992), the appellate court affirmed an award of joint custody to the husband and the wife in circumstances where the husband spent nights with his lover in the presence of the children. The court found that the children had formed a "nonthreatening, platonic relationship" with the lover and hence there was no harm in continuing joint custody. *Id.* at 418-19.

[65] GROSSBERG, *supra* note 10, at 290.

[66] *Id.*

is sometimes compounded as the discourse of child custody allocation has, as one commentator has suggested, all too often painted children as "innocent victims" of their parents' (read "mother's") licentiousness.[67] While the blamelessness of children in regards to their parents' actions is not a matter for dispute, courts often fail to offer more contextual and nuanced portraits of parents, especially mothers, as complex beings with a myriad of needs who possess strengths as well as imperfections. Instead, many women whose maternal fitness is questioned as a result of actual or alleged illicit sexual relationships have historically and contemporarily been labeled as "immoral" with little examination of their parenting.[68] This may be true regardless of whether the condemned sexual behavior was during the course of the marriage or after its termination.

This type of thinking is sometimes a result of what has been called the "binary hypothesis"—the idea that there are no degrees of moral rightness or wrongness only clear certainties of total right or wrong.[69] This view is widely held throughout the world and is even embraced by a number of thinkers.[70]

> We see this in our every day use of words with such things as right and wrong, good and evil, truth and lies. The result of these binaries is that one side is always favored over the other, based on the subjective ethics of the individual and the community that produces the particular binary.[71]

In addition, the end result of such binaries may be "a form of dogma that rarely allows for alternate explanations,"[72] and leads ultimately to a world in which power arrangements, especially those that are gender-based, are endlessly replicated.

While women have gained more social freedom in many arenas, in their roles as mothers they have been consistently held to stringent standards. Hence, while rules in most jurisdictions no longer make divorce or separation as difficult as it was in the past,[73] child custody norms have often adhered to traditional views of women as mothers. Child custody norms, and their concomitant discursive frames, especially the focus on

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[67] Martha L. Fineman, *The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making in the USA*, *in* CHILD CUSTODY AND THE POLITICS OF GENDER 27, 27 (Carol Smart & Selma Sevenhuijsen eds., 1989).

[68] *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests,* 81 MICH. L. REV. 463, 565 (1983).

[69] TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES viii (2000).

[70] *Id.* at 79.

[71] Shaun Michael Jex, *Killing the Binary: Deconstruction in the 21st Century,* SUITE 101 (Oct. 21, 2001), http://www.suite101.com/article.cfm/literary_theory_explorations/82973.

[72] *Id.*

[73] Fineman, *supra* note 67, at 27.

moral fitness, have often served to preserve masculine prerogatives and power.[74]

III. MORAL FITNESS IN CHILD CUSTODY AND ITS RELATIONSHIP TO MORAL LUCK

A. The Nature of "Moral Fitness"

Traditionally, morality referred to the goodness or badness of behavior. Stated as such, discussions of morality in child custody have become less prevalent (or less obvious) in policy debates.[75] This is part of a broader move away from the "polarization of moral issues."[76] While some morality discussions have become more opaque in the context of child custody, morality has come to implicate far more. The "moral fitness" standard is one instance of a seemingly straightforward yet highly complex application of the idea of morality.

Moral fitness is generally seen as a factor to consider in situations of marital misconduct such as adultery, and in some situations of post-marital misconduct involving sexual impropriety.[77] As a general rule, such conduct must be shown to have a present adverse effect on the child in order for the misconduct to be relevant.[78] Many United States courts have concluded that custody should not be awarded to punish one party for misconduct directed at the other spouse or to award another party for virtue.[79] Indeed, as articulated by one court, "restrained normal sexual behavior does not make a parent unfit."[80] This principle is also seen in the Uniform Marriage and Divorce Act (UMDA).[81] The UMDA provides that "[t]he court shall

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[74] *Id.* at 27-28.

[75] Carol Smart, *The Legal and Moral Ordering of Child Custody,* 18 J.L. & SOC'Y 485, 487 (1991).

[76] *Id.*

[77] *See* Alan M. Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 29-32 (1965).

[78] *See, e.g.,* Hartley v. Hartley, 355 S.E.2d 869, 872 (S.C. Ct. App. 1987) ("A parent's morality, while a proper consideration, is 'limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child.'").

[79] *See, e.g.*, Fuchs v. Fuchs, 887 S.W.2d 414, 415 (Mo. Ct. App. 1994) (stating that child "[c]ustody decisions are not to be made as punishment of a parent"); T.B.G. v. C.A.G., 772 S.W.2d 653, 655 (Mo. 1989) (en banc) (stating that "[a]warding custody of a child to one spouse rather than the other should not be a 'reward' or 'punishment' for conduct of other spouse"); Barnhill v. Barnhill, 826 S.W.2d 443,453 (Tenn. Ct. App. 1991) (finding that a custody award is not punishment); In re Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983) (en banc) (stating that child "custody and visitation rights are not to be used to penalize or reward parents for their conduct").

[80] Marilyn H. v. Roger Lee H., 455 S.E.2d 570, 574 (W. Va. 1995) (quoting David M. v. Margaret M., 385 S.E.2d 912, 924 (W. Va. 1989)).

[81] UNIF. MARRIAGE & DIVORCE ACT § 402 (amended 1974). The Uniform Marriage and Divorce Act (UMDA) is a uniform law consisting of five parts. *Model Marriage and Divorce Act Summary,* UNIF. LAW COMM'N, http://uniformlaws.org/ActSummary.aspx?title=Model%20Marriage%20and%20Divorce%20Act (last visited Mar. 23, 2011).

not consider conduct of a proposed custodian that does not affect his relationship to the child."[82]

However, despite the modern assertion that sexual impropriety or affairs will not be the sole decisive factor in determining child custody between separation parents,[83] courts have shown little sympathy for parents involved in "notorious" affairs—affairs that significantly offend norms of social propriety.[84] This is especially true where a parent engages in such behavior with the knowledge of their children.[85] A plurality of the cases in this area seems to feature mothers in "flagrant" behavior.[86] Those cases considered most aggravating are where the children find a parent, often their mother, in bed with a "paramour".[87] Such behavior is seen as a

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> Part I has general provisions on construction of the statute . . . . Part II pertains to marriage. Part III concerns dissolution of marriage. Part IV is devoted to child custody. Part V relates to the effective date of passage, and to repeal of any part, and is a standard and short section.

Id. It has been enacted in several states: Arizona (ARIZ. REV. STAT. §§ 25-311 - 25-330, 25-401 - 25-411 (LexisNexis 2011)), Colorado (COLO. REV. STAT. §§ 14-2-101 - 14-2-113, 14-10-101 - 14-10-133 (LexisNexis 2010)), Illinois (750 ILL. COMP. STAT. ANN. 5/101 - 5/802 (LexisNexis 2011)), Kentucky (KY. REV. STAT. §§ 403.010 - 403.350 (LexisNexis 2010)), Minnesota (MINN. STAT. ANN. §§ 518.002 - 518.66 (West 2010)), Missouri (MO. ANN. STAT. §§ 452.300 - 452.416 (West 2010)), Montana (MONT. CODE ANN. §§ 40-1-101 - 40-1-404, 40-4-101 - 40-4-226), and Washington (WASH. REV. CODE ANN. § 26.09.181 et seq. (LexisNexis 2011)).

[82] *See* UNIF. MARRIAGE & DIVORCE ACT § 402 (amended 1974).

[83] *See* Stamps et al, *supra* note 50, at 5-6.

[84] *See, e.g.*, Burris v. Burris, 388 N.E.2d 811, 814 (Ill. App. Ct. 1979) (finding that even though the mother was accused of being involved in "'open and notorious fornication,'" she was still fit to be granted custody of her children).

[85] *See, e.g., infra* note 88.

[86] For example, in *Trunik v. Trunik*, 426 A.2d 274, 275 (Conn. 1979), a mother appealed from an order of the trial court changing child custody from the mother to the ex-husband. The mother argued that "the trial court erred because the evidence was insufficient to warrant its conclusion that a change of custody would be in the children's best interests." *Id.* at 275. The Supreme Court held that where the "father had remarried and he and his present wife were capable of caring for his children," and where the mother, while the children were home, "frequently entertained a variety of nocturnal male visitors", granting child custody to the father was not an abuse of discretion. *Id.* In another case, *Murphree v. Murphree*, 579 So. 2d 634, 636 (Ala. Civ. App. 1991), custody was awarded to the father when the evidence showed that the mother had engaged in three adulterous affairs and that the children had had negative reactions to those affairs. A similar finding is seen in *D.K.L. v. L.C.L.*, 764 S.W.2d 664, 665 (Mo. Ct. App. 1988), where a mother "frequented bars" and engaged in many extra-marital relationships; custody to the father was affirmed). In *Lovin v. Lovin*, 787 S.W.2d 865, 866-67 (Mo. Ct. App. 1990), sex between a mother and her "friend" occurred in the contesting parents' home at times when their preschool child was home; there, custody denied to mother. In *Krug v. Krug*, 647 S.W.2d 790, 792-93 (Ky. 1983), a mother was denied custody in significant part because of her numerous sexual affairs.

[87] *See, e.g.*, Adam v. Adam, 436 N.W.2d 266, 267 (S.D. 1989) (where the mother had an affair during the marriage. The child knew of the relationship, and was apparently upset by it. One fact in evidence was that the mother, daughter, and the mother's lover went on a camping trip and the mother and her lover slept in the tent while the daughter slept in the car). Jennings v. Jennings, 490 So. 2d 10, 12 (Ala. Civ. App. 1986) (a mother slept with her boss in room adjoining child's); In re Marriage of

window into a parent's character and moral fitness, and what is revealed through such windows may frequently depend upon parental gender and life circumstances outside of the control of the parent.

B. "Lucky in Life, Unlucky in Love?"[88]

As gendered beings in a patriarchal society, "women and men inherit different pasts and consequently different social expectations" and these expectations often shape character.[89] When this happens, character becomes part of what some scholars have called "moral luck".[90] The problem of moral luck arises in many cases because it seems correct to morally evaluate an agent despite the fact that an important part of that upon which an agent is evaluated depends on factors outside of that person's control.[91] These situations of moral luck are, however, seemingly in direct conflict with what is often seen as an intuitive moral principle, the principle of control,[92] which posits that an agent is only morally evaluable to the extent that the agent is in control of the factors upon which he is evaluated. In short, moral luck has to do with factors, either good or bad, that are beyond the control of the agent.[93]

The notion of morals being subject to chance seems contrary to longstanding ideas about the nature of morality. As one scholar writes, while few people adhere to the idea that one's life can be immune to luck, there remains in place a "powerfully influential idea that there is one basic form of value, moral value, which is immune to luck and—in the crucial term of the idea's most rigorous exponent—'unconditioned'."[94] However, it is commonly understood that the behavior and choices made by any actor are shaped by the circumstances with which the actor is confronted. While we often posit that an actor's intent is paramount in assessing the rightness or wrongness of an action or the extent to which an actor should be held accountable, we also understand that in some cases the social or legal value of intentions depends upon external circumstances or, as we summarily call it, "luck". According to Nagel, this luck may have four forms, including "constitutive luck," consisting of the "kind of person you are . . . your

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Pothast, 539 N.W.2d 199, 201 (Iowa Ct. App. 1995) (mother who slept with boyfriend in front of child in hotel properly denied custody).

[88] Mark Hoekstra & Scott Hankins, *Lucky in Life, Unlucky in Love? The Effect of Random Income Shocks on Marriage and Divorce* (Univ. of Pittsburgh, Dep't of Econ., Working Paper No. 329, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629878.

[89] Claudia Card, *Gender and Moral Luck*, *in* IDENTITY, CHARACTER, AND MORALITY: ESSAYS IN MORAL PSYCHOLOGY 199, 199 (Owen Flanagan and Amélie Oksenberg Rorty eds., 1990).

[90] *Id.*; *see generally, e.g.*, Thomas Nagel, *Moral Luck*, *in* MORAL LUCK 57 (Daniel Statman ed., 1993); Bernard Williams, *Moral Luck* in MORAL LUCK 35 (Daniel Statman ed., 1993); CLAUDIA CARD, THE UNNATURAL LOTTERY: CHARACTER AND MORAL LUCK (1996).

[91] *See generally* Nagel, *supra* note 90.

[92] Nagel, *supra* note 90, at 59-60.

[93] Card, *supra* note 89, at 199; Nagel, *supra* note 90, at 58.

[94] Williams, *supra* note 90, at 35.

inclinations, capacities, and temperament."[95] Another form of moral luck may be luck in circumstances, such as "the kind of problems and situations one faces."[96] The other two types of moral luck "have to do with the causes and effects of action: luck in how one is determined by antecedent circumstances, and luck in the way one's actions and projects turn out."[97] All four forms of moral luck can affect assessments of women's morals and character. The second and the third, problems and situations faced and the outcome of situations, are especially salient in the context of child custody allocation between mothers and fathers.

Women may face a number of problems that shape their lives and behavior. One significant and overarching problem is the way that patriarchy exists as an oppressive force in many women's lives. The behavior of some women may be in direct response to this experience of patriarchal oppression, and this may lead to special insights or even the development of enhanced mechanisms for resistance.[98] It may be argued that making such assumptions may tend to romanticize women's experiences of oppression; indeed, oppression may lead to a lack of resistance altogether and could encourage self-abnegation and delusion more readily than insight.[99] As a result of patriarchy, morality and character become flexible concepts wherein the experiences of women are not central. Hence, structuring legal decisions about child custody on parents' morality or character is rife with the potential for disadvantage to women.

Another life problem to which women are especially subject is poverty.[100] The feminization of poverty is a well-documented phenomenon that occurs nationally and internationally, and is a problem that shows no sign of abating.[101] Poverty is often closely tied to morality.[102] Being poor is, strictly speaking, neither immoral nor illegal.[103] All too often, however, poverty is treated as a moral failing of individuals themselves, especially when the poor people are persons of color.[104] As one scholar has observed, there is a significant jurisprudence of poverty in the United States, that is, a

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[95] Nagel, *supra* note 90, at 60.

[96] *Id.*

[97] *Id.*

[98] *See* Card, *supra* note 89, at 200.

[99] *Id.*

[100] *See* Gertrude Schaffner Goldberg, *Revisiting the Feminization of Poverty in Cross-National Perspective, in* POOR WOMEN IN RICH COUNTRIES: THE FEMINIZATION OF POVERTY OVER THE LIFE COURSE 3, 3-5 (Gertrude Schaffner Goldberg ed., 2010).

[101] *See id.* Schaffner indicates that women's poverty in the United States is especially pernicious when compared to other developed nations, as women's poverty in the United States has increased significantly over the last few decades. *Id.*

[102] *See* Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness,* 79 GEO. L.J. 1499, 1502 (1991).

[103] *Id.* at 1515 n.68.

[104] STEVEN GREGORY, BLACK CORONA: RACE AND THE POLITICS OF PLACE IN AN URBAN COMMUNITY 105 (1998).

body of cases wherein courts, including the United States Supreme Court, have addressed the extent to which poverty figures substantially.[105] In such cases, courts often employ a "rhetoric of difference and deviance" when speaking of the poor.[106] This includes asserting, either expressly or impliedly, that poor people are "unwilling to work and especially likely to . . . violate other legal and moral norms."[107]

Besides the moral luck stemming from the problems and situations that women face, another form of moral luck that may figure prominently in the lives of women is Nagel's last form, "luck in the way one's actions and projects turn out."[108] The expression "all's well that ends well" seems particularly apt here.[109] In some cases, especially those where women succeed in obtaining custody of their children, there are what J.R.R. Tolkien termed "eucatastrophic" endings.[110] Tolkien coined the term "eucatastrophe" in his discussion of fairy stories.[111] It refers to a "'good catastrophe, the sudden, joyous 'turn'" at the end of a story that results in the protagonist's well being.[112] According to one scholar, achieving eucatastrophe involves "recovery" and "restoration," which is a process of "defamiliarization of the known world in order to better appreciate its qualities."[113] Eucatastrophe reverses the tragic meaning of catastrophe found in Greek tales and creates, usually within the context of fantasy or supernatural tales, an escape from death.[114] Immoral mothers who attain redemption arguably experience that process of defamiliarization when they leave the bounds of good motherhood. When these women are redeemed, they escape not from literal death, but from an ignominious social death.[115]

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[105] Ross, *supra* note 102, at 1499.

[106] *Id.* at 1500 n.2.

[107] *Id.* at 1499.

[108] *See* Nagel, *supra* note 90, at 60.

[109] Shakespeare's *All's Well that Ends Well* offers a good example of moral luck as luck in outcome given the basic story line: a woman who faces obstacles such as lowly birth uses feminine wiles to win a man, thereby risking all, and in the end, succeeds. *See* WILLIAM SHAKESPEARE, ALL'S WELL THAT ENDS WELL (Susan Snyder ed., 1993).

[110] *See* Garbowski, *supra* note 20, at 176-77.

[111] *Id.* at 176. Shakespeare's *All's Well that Ends Well* and *Measure for Measure* have both been described as examples of Tolkien's eucatastrophe, especially in how the disquieting pressure of outside forces is ultimately and happily resolved with a new beginning for the heroines of both of those plays. *See* A. D. Nuttall, Measure for Measure: *The Bed-Trick*, *in* THE CAMBRIDGE SHAKESPEARE LIBRARY: VOLUME II: SHAKESPEARE CRITICISM 52, 55 (Catherine M. S. Alexander ed., 2003); *see also* Mary Free, All's Well That Ends Well *as Noncomic Comedy*, *in* ACTING FUNNY: COMIC THEORY AND PRACTICE IN SHAKESPEARE'S PLAYS 40, 40-41 (Frances Teague ed., 1994).

[112] Garbowski, *supra* note 20, at 176.

[113] *Id.*

[114] VERLYN FLIEGER, SPLINTERED LIGHT: LOGOS AND LANGUAGE IN TOLKIEN'S WORLD 27-28 (The Kent State Univ. Press 2002) (1983).

[115] The term social death has been attributed to ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961). It was later taken up by a number of scholars. *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE

IV. EUCATASTROPHE AND A CHANGE IN MORAL LUCK: *BURRIS V. BURRIS*

There are a number of cases that potentially illustrate the notion of women's moral luck and a change in fortunes after sexually inappropriate activity in the context of child custody.[116] While some cases result in "wins" for the mothers, that is, they are able to obtain custody of their

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STUDY 38-41 (1982). Patterson describes two conceptions of social death in the context of slavery. *Id.* at 38. One mode was intrusive social death wherein the person deemed a "slave was ritually incorporated as the permanent enemy on the inside – the 'domestic enemy.'" *Id.* at 39. Additionally "he did not and could not belong because he was the product of a hostile . . . culture" and was "an intruder in the sacred space." *Id.* The extrusive model of social death was of the "insider who had fallen," typically by failing to meet communal norms of behavior. *Id.* at 41. Patterson notes that the destitute were included in this latter group, as their "failure to survive on their own was taken as a sign of innate incompetence and of divine disfavor." *Id.*

[116] Some examples of such cases that I have considered in other work are Lipsey v. Lipsey, 450 So. 2d 1095, 1096-97 (Ala. Civ. App. 1984) (considering the mother's "adulterous affair" when affirming custody to the father); Sain v. Sain, 426 So. 2d 853, 855 (Ala. Civ. App. 1983) (finding that evidence of the mother committing adultery is insufficient to grant custody to the father); Simons v. Simons, 374 A.2d 1040, 1042 (Conn. 1977) (stating that "[t]he remarriage of the noncustodial parent by itself has been held not [enough] to justify opening the question of custody"); Trunik v. Trunik, 426 A.2d 274, 275 (Conn. 1979) (finding that where the mother "frequently entertained a variety of nocturnal male visitors," custody was properly awarded to the father); Dinkel v. Dinkel, 322 So. 2d 22, 23-24 (Fla. 1975) (finding that despite the fact that the mother committed adultery, custody was properly granted to the mother); Bridges v. Bridges, 398 S.E.2d 860, 861 (Ga. Ct. App. 1990) (granting custody to father when mother admitted to having "sexual intercourse in the presence of her two minor children"); Huey v. Huey, 322 N.E.2d 560, 562 (Ill. App. Ct. 1975) (stating that "the mere fact that a divorce has been awarded to a husband on the grounds that the wife was guilty of adultery does not prevent the trial court from exercising its discretion and awarding custody of the children to the wife"); Burris v. Burris, 388 N.E.2d 811, 812, 814-15 (Ill. App. Ct. 1979) (finding that where a mother and her children have moved in with another male, the mother may retain custody of the children); Huffman v. Huffman, 176 N.W.2d 859, 861-63 (Iowa 1970) (finding that were a mother married "the man with whom she was accused of having committed adultery," circumstances did not change enough to grant the mother custody over the father); Maron v. Maron, 28 N.W.2d 17, 20 (Iowa 1947) (finding that "[t]he mother's admitted adultery . . . with the man whom she married in another state the day following her divorce" was sufficient reason to grant the father custody); Krug v. Krug, 647 S.W.2d 790, 793 (Ky. 1983) (stating that if a mother's "misconduct has affected, or is likely to affect, the child adversely," custody should be granted to the father); Moore v. Moore, 479 So. 2d 1040, 1043 (La. Ct. App. 1985) (finding that where a mother allegedly engages in prostitution and commits adultery, custody can be "take[n] . . . away from the natural parent"); Remus v. Remus, 39 N.W.2d 211, 212 (Mich. 1949) (finding that even though the wife was "infatuated and associated with another man extensively and openly," it was proper to award custody to the mother); Florea v. Florea, 688 S.W.2d 373, 374-75 (Mo. Ct. App. 1985) (finding that while "adultery, standing alone, does not require . . . a change of custody of children from one parent to the other," adultery in combination with frequently moving the child is sufficient to change custody); Church v. Church, 656 N.Y.S.2d 416, 417 (N.Y. App. Div. 1997) (finding that where a mother engaged in an adulterous affair, allowing her "paramour" to spend the night, it is in the best interests of the child to grant custody to the father); Anderson v. Anderson, 771 N.E.2d 303, 311 (Ohio Ct. App. 2002) (finding that where "the trial court based its child custody decision . . . on the family instability caused by [wife's] extramarital affairs," it was reasonable to award custody to the husband); Commonwealth ex. rel. Link v. Link, 55 Pa. D. & C.2d 60, 74-75 (Pa. Ct. Com. Pl. 1971) (finding that even if the "evidence was sufficient to establish an inference of adultery," custody can be granted to the mother if the relationship does not effect the children); Varley v. Varley, 934 S.W.2d 659, 666-68 (Tenn. Ct. App. 1996) (finding that wife's adultery in combination with "neglect of the children" was sufficient to grant custody to the husband).

children, other cases result in "losses".[117] Such cases form part of a larger set of cases that consider the factors to be assessed in making an award of child custody in cases of divorce or separation.[118] For instance, executing a Boolean search string for locating such cases ((custody visit! /10 child!) /15 (factor consider! affect effect weigh!) /p adultery) yields hundreds of cases.[119] Most such cases fall in the period from 1950 to 1990, with only a relative few falling outside of this period.

The legal issues at stake in these cases offers a view of the social, political, and economic conditions that affected the United States legal system during this period. The years immediately after World War II heralded an opening of United States society, the advent of the civil rights movement, and to some extent the achievement of the promise of that movement.[120] At the same time, with the return of service men from war, many of the freedoms women had gained during the war period dissolved as women returned to the home.[121] The post-war period was, to a certain extent, the beginning of a politically conservative retrenchment for women. Though the women's rights movement of the 1960s and 1970s drew inspiration from the civil rights movement and saw significant gains, women were still very frequently ensconced in the home, hobbled by

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[117] "Winning" or "losing" in a legal case is sometimes not a straightforward, binary yes/no situation, since numerous issues may be raised at various levels of the proceeding. There are also partial victories and losses, as well as nominal victories and losses. I count as "wins" those cases where the reviewing court made a clear statement granting women custody of their children or where the matter was remanded to the court below for proceedings that would either grant women custody or where they had a full opportunity to argue or re-argue for custody. I count as "losses" those cases where the reviewing court clearly denied women custody, or where the matter was remanded to the court below for proceedings that would remove custody from women, or where the reviewing court indicated that the father would have a full opportunity to argue against maternal custody and cited factors opposing maternal custody. Using these definitions of wins and losses, I found in the cases I reviewed that mothers accused of sexual misconduct won custody only about half the time.

[118] In order to find cases that highlighted allegations of sexual indiscretion in child custody matters, I began with American Law Reports. *See generally* C. T. Drechsler, *Award of Custody of Child to Parent Against Whom Divorce is Decreed*, 23 A.L.R. 3d 6 (1969). American Law Reports (ALR) is a frequently used resource employed by researchers of United States law to find a variety of sources "relating to specific legal rules, doctrines, or principles." *Legal Encyclopedias – Legal Research Guides*, UNIV. OF FLA. LIBRARIES, http://guides.uflib.ufl.edu/content.php?pid=44432&sid=757091 (last visited Mar. 15, 2011). ALR, while a type of legal encyclopedia, differs in that "ALR annotations . . . delve more deeply into a specific legal principles or doctrines, while, in contrast, encyclopedia articles aim for a broader view of the legal issue." *Id.* ALR has been published since 1919 and remains an important research tool for researching United States law. *Id.*

[119] Boolean searching is a process by which "the user searches a database with a query that connects words with operators, such as AND, OR, or NOT." PETER JACKSON & ISABELLE MOULINIER, NATURAL LANGUAGE PROCESSING FOR ONLINE APPLICATIONS: TEXT RETRIEVAL, EXTRACTION AND CATEGORIZATION 27 (2007).

[120] *See* John Higham, *Introduction: A Historical Perspective, in* CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II 3, 8-9 (John Higham ed., 1997).

[121] *Rosie the Riveter: Women Working During World War II*, U.S. NAT'L PARK SERV., http://www.nps.gov/pwro/collection/website/rosie.htm (last visited Mar. 22, 2011).

longstanding gender norms.[122] Such norms were frequently displayed in cases involving allegations of a mother's sexual misconduct in the context of child custody allocation.[123] One case that is exemplary of the body of cases in this area is *Burris v. Burris*.[124]

In *Burris*, the Appellate Court of Illinois offers several discursive themes that frequently figure in assessments of the mother's morality: discourses of home and homeownership, discourses concerning the importance of the nuclear family, discourses of male health and virility that relate to male economic dominance, and finally, the overarching discourses of surveillance that frame all of the court's discussion.[125] These discourses shape the extent to which or whether the mother's sexual conduct is deemed as "moral" or "immoral," and therefore figure in whether mothers "win"[126] in cases where they seek custody of their children.

In *Burris*, a former husband petitioned to modify a divorce decree and obtain custody of his children based upon allegations about his former wife's cohabitation with a man without being married to him.[127] In assessing the case, the Appellate Court of Illinois stated that "allegedly immoral conduct, in and of itself, without a showing of detriment to the child, is insufficient proof of the unfitness" of a proposed custodian.[128] The Court therefore affirmed a decree awarding custody to the wife.[129]

The court seems to premise much of its conclusion upon the fact that the male co-habitant of the wife provides economic support for the wife and children.[130] For instance, the court writes: "[u]ntil immediately before the hearing in November 1977, respondent [wife] was unemployed. She initially attempted to support herself and the children with child support payments from Mr. Burris. Since August of 1975, respondent and the children have been supported primarily by Mr. Weston [the male co-habitant]."[131]

It is first and foremost noteworthy that the court here, unlike many of the courts seen in such cases, refers to the wife's new partner by name.[132]

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[122] SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT 11-12, 24 (1979).

[123] I discuss several such cases at length in Lolita Buckner Inniss, "Sisters Underneath their Skins": Theorizing Maternal Performativity in Legal Discourses of White Women's Race-Involved Child Custody Disputes in the United States, 1941-2004 (2011) (unpublished Ph.D. dissertation, York University).

[124] 388 N.E.2d 811 (Ill. App. Ct. 1979).

[125] *See generally* Burris v. Burris, 388 N.E.2d 811 (Ill. App. Ct. 1979).

[126] *See supra* note 117 for a discussion of the notion of "winning" or "losing" in child custody cases.

[127] *Burris,* 388 N.E.2d at 812, 815.

[128] *Id.* at 814.

[129] *Id.* at 815.

[130] *See id.* at 812.

[131] *Id.*

[132] *Compare id., with* Lipsey v. Lipsey, 450 So. 2d 1095, 1097 (Ala. Civ. App. 1984) (referring to the wife's new partner as an "alcoholic paramour"), and Church v. Church, 656 N.Y.S.2d 416, 417 (N.Y. App. Div. 1997) (referring to the wife's new partner as her "paramour").

This seems to bode well for the mother in *Burris*.[133] Indeed, the court, while noting that Mrs. Burris lives with Mr. Weston without the benefit of marriage, includes in its decision testimony from Mrs. Burris about her living arrangements: "[r]espondent [the wife, Mrs. Burris] described Weston's home as having three bedrooms, a living room, a large kitchen, a utility room and bath, a full basement and an attic. Apparently when she first moved in with Weston, his home had only one bedroom; two bedrooms were subsequently added."[134]

The court appears to be taken with what it considers quality living arrangements. Continuing, the court notes that the wife and Weston "live together as husband and wife and that they share the same bed, but . . . they have no plans to marry."[135] The mother's non-marital cohabitation would seem to undermine her case for retaining custody. However, shortly after offering this language the court opens what may be construed as a redemptive morality discourse surrounding the couple's living conditions. The court remarks that "Weston owns the home in which they reside."[136] The couple, though unmarried, *resides* in a *home*, not a house, and moreover, Weston *owns* that home.[137]

There are clearly positive connotations in the selection of the word "home" over the word "house." "Home," in contrast to "house," is a freighted word that brings with it a number of understandings, many of them having emotional overtones and ideologies of belonging.[138] Home often posits stasis and permanence and the diametric opposite of movement or migration.[139] One of the "primary connotation[s] of 'home' is of the 'private' space from which the individual travels into the larger arenas of life and to which he or she returns at the end of the day."[140] The word also has "wider significance as the geographic place where one belongs: country, city, village, community."[141] Additionally, "[h]ome is also the imagined location that can be more readily fixed in a mental landscape than in actual geography."[142] Perhaps most important here, home is typically construed as a "woman's place," her natural environment.[143]

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[133] *See Burris*, 388 N.E.2d at 815.

[134] *Id.* at 812.

[135] *Id.*

[136] *Id.*

[137] *See id.*

[138] *See* ROSEMARY MARANGOLY GEORGE, THE POLITICS OF HOME: POSTCOLONIAL RELOCATIONS AND TWENTIETH-CENTURY FICTION 1-2 (1996) (discussing the connotation of the word "home").

[139] *See* Sara Ahmed et al., *Introduction: Uprootings/Regroundings: Questions of Home and Migration, in* UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION 1, 2 (Sara Ahmed ed., 2003).

[140] MARANGOLY GEORGE, *supra* note 138, at 11.

[141] *Id.*

[142] *Id.*

[143] ELIZABETH JANEWAY, MAN'S WORLD, WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY 15 (1971). Janeway, a renowned scholar and writer on women's issues, considered how the development

Beyond this, by noting Weston's home ownership, the court engages in what some scholars have called a *discourse of home ownership.*[144] Such discourses constitute housing as a social object supported by law and society.[145] "Home ownership" becomes an ideological framework that connotes and encompasses notions of home, family, stability, and the "proper path" to life.[146] As one scholar suggests, home ownership discourses in the United States have also historically been deeply class conscious and racialized as the interests of white elites seeking to maintain racially, socially, and economically segregated neighborhoods were expressed via such discourses.[147] In this regard, "the terms 'homeowner' and 'homeownership' became charged with particular meanings."[148] These phrases were often tied to notions of citizenship, nationalism, and the triumph of private capital over public spending, and they relied upon white privilege for meaning.[149]

Additionally, the court in *Burris* notes that Mr. Weston's behavior establishes him as a crucial part of the mother's re-established nuclear family: "Weston is divorced and has one child who neither lives with nor visits him. He is employed as a heavy equipment operator, is usually home when the Burris children return from school, and frequently baby-sits with them."[150] It would seem that in indicating that Mr. Weston has no other familial claims upon him (even though he has another child) and by emphasizing his availability for the Burris children, the court constructs Mr. Weston as not just "*a* father" but "*the* father" to the Burris children. While the court offers a recitation of how the children's natural father, Mr. Burris, has remarried, the court also remarks that his new wife has three children and that he has a new child with that wife, meaning four children in the father's new household.[151] These four children are part of *another* family unit. Traditionally, the nuclear family is understood as a unit consisting of a father and mother in their first marriage and the children of that marriage.[152] The nuclear family is often contrasted with the extended family, which consists of ancestors such as grandparents or collateral

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of images regarding the gathering of children to the hearth developed into the notion of that hearthspace, home, as the woman's milieu.

[144] *See, e.g.*, Richard Ronald, *Meanings of Property and Home Ownership Consumption in Divergent Socio-Economic Conditions, in* HOME OWNERSHIP: GETTING IN, GETTING FROM, GETTING OUT. PART II 127, 131 (John Doling & Marja Elsinga eds., 2006).

[145] *Id.* at 133.

[146] *Id.* at 132.

[147] LEEANN LANDS, THE CULTURE OF PROPERTY: RACE, CLASS, AND HOUSING LANDSCAPES IN ATLANTA, 1880-1950 9-10 (2009).

[148] *Id.* at 10.

[149] *Id.* at 10.

[150] Burris v. Burris, 388 N.E.2d 811, 812 (Ill. App. Ct. 1979).

[151] *Id.* at 813.

[152] *See* Janet L. Dolgin, *The Constitution As Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 381-82 (2002).

relations such as aunts, uncles, or cousins.[153] However, as divorce has become more common in the last several decades, both law and society have enlarged the understanding not only of family, but also of the nuclear family.[154] Divorced or separated parents who enter into new intimate relationships and thereby "replace" the missing husband or wife and otherwise engage in family living that approximates nuclear-family style living are frequently seen as better parents.[155]

Perhaps most striking in *Burris* is the court's description of the natural father's physical limitations and resultant economic situation.[156] "Subsequent to his divorce," the court writes, "Burris became disabled and began receiving social security benefits. He suffers form a blinding eye disease; however, his physician indicated his vision could improve."[157] The court also notes that Mr. Burris's benefits are $550.00 per month, a reduction from the $1000 per month her earned before becoming disabled.[158] It would seem that part of the court's construction of a successful father is one who has an able body and the economic ability to support his family.

The notion of an economic aspect to manliness is one that has prevailed in the United States throughout much of the last century.[159] Victorian manhood in both England and the United States stressed gentlemanliness, restraint, and reticence about financial affairs.[160] However, the middle and upper class hesitance to display wealth and/or other indicia of success changed at the turn of the nineteenth century, especially in the United States.[161] Modern manliness included pride in social and economic accomplishments.[162] According to one scholar, this change was the culmination of a number of factors, among them a move from an economy dominated by agriculture and "small-scale competitive capitalism" to one dominated by large-scale, urbanized concerns.[163] Moreover, as racial and gender hierarchies were challenged by freed blacks, immigrants, and

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[153] *See id.* at 382-83.

[154] *See id.* at 371-72.

[155] Dolgin, *supra* note 152, at 373.

[156] *See Burris*, 388 N.E.2d at 813.

[157] *Id.*

[158] *Id.*

[159] *See, e.g.*, Thomas Winter, *Class, in* AMERICAN MASCULINITIES: A HISTORICAL ENCYCLOPEDIA 96, 96-98 (Bret E. Carroll ed., 2003).

[160] *See* Peter Dobkin Hall & George E. Marcus, *Why Should Men Leave Great Fortunes to Their Children? Dynasty and Inheritance in America, in* INHERITANCE AND WEALTH IN AMERICA 139, 153-154 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998). *See also* David Kuchta, *The Making of the Self-Made Man: Class, Clothing, and English Masculinity, 1688-1832, in* THE SEX OF THINGS: GENDER AND CONSUMPTION IN HISTORICAL PERSPECTIVE 54, 55, 60, 63 (Victoria de Grazia & Ellen Furlough eds., 1996).

[161] GAIL BEDERMAN, MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917 11-15 (1995).

[162] *Id.* at 12.

[163] *Id.*

women, the model of successful manhood increasingly became one of virility and physical strength coupled with a conspicuous economic prowess.[164]

In *Burris,* the court writes that while Mr. Burris testified that the "children were 'troubled' by their mother's living arrangement with Weston, . . . [t]here was no evidence that any of [the children's] difficulties had been brought about by the children's living with their mother and Weston."[165] Perhaps most damning for Mr. Burris was the court's assertion that Mr. Burris had testified "'he couldn't say too much against Mr. Weston as far as how he has provided for the children.'"[166] In short, the court's recitation of this quote from the father seems to suggest that Mr. Weston, while not married to the children's mother, has, by even the natural father's account, acted as a parent to the children. The trial court demurred to strongly condemn the mother's involvement, stating "'[w]hile there is no doubt that my personal code of morality might be different from Mrs. Burris' I don't think I can let that enter into my decision.'"[167]

The trial court follows this language, seemingly approving of Mrs. Burris and her live-in partner, with what appears to be the death knell for Mr. Burris's claim for custody:

> "While it is certainly not of Mr. Burris' making he does have a problem, of course with his sight. He [sic] has affected his income and at this time apparently he is not certain whether [he] is going to be [on] permanent disability or a temporary disability. It is something that must be taken into consideration."[168]

The Appellate Court goes on to write that even if, as the father argued, the mother lived with a man in "open and notorious fornication"[169] that, in and of itself, did not constitute unfitness. The mother was not "displaying her relationship with Weston to the embarrassment or detriment of the children."[170] Additionally, "[t]here was no scandalous effect of their behavior either on their children or the public or any affront to the marital institution shown of record."[171]

These words of the court regarding the absence of a "display" capture a significant aspect of the notion of surveillance and its importance in cases where the mother engages in sexual misconduct. The role of surveillance, or more broadly, the "gaze," as a form of social control has been widely

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[164] *Id.* at 16-20.
[165] Burris v. Burris, 388 N.E.2d 811, 813 (Ill. App. Ct. 1979).
[166] *Id.*
[167] *Id.*
[168] *Id.* at 813.
[169] *Id.* at 814.
[170] *Id.*
[171] *Burris*, 388 N.E.2d at 814.

discussed in Western law and society.[172] "The concept of the gaze describes a form of power associated with the eye and the sense of sight."[173] The power of the gaze, as one scholar writes, is ancient: this power is exemplified in representations of the gaze in folklore, mythology, and popular culture.[174] Related to the power of the gaze is the explicit discussion regarding the power inherent in watching others as a form of control, much of which dates back to Jeremy Bentham and his work *The Panopticon Writings*.[175] A panopticon, as Bentham envisioned it, was a type of prison building where "the inspector can see each of the prisoners at all times, without being seen."[176]

Contemporary discussions of surveillance as a form of social control have sometimes analogized the uses of new techniques of surveillance to Bentham's ideas.[177] While a significant number of these discussions continue to occur in a criminal justice context,[178] there has also been a wider application of the notion of panopticism.[179] Feminist scholars have argued that in the case of women, these newer models of the binary have been superimposed on the old without superseding them, and even when superseding them, replicated existing power dynamics. In the particular instance of maternal behavior, both actual surveillance techniques and surveillance discourses seen in cases render the maternal body is legible, leading to a preoccupation with the visible properties of motherhood. Here is where factors such as the mother's absence from home or the race of a mother's "male companion" or "paramour"[180] play a decisive role. In

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[172] *See, e.g.*, DANI CAVALLARO, CRITICAL AND CULTURAL THEORY: THEMATIC VARIATIONS ch. 6 (2001).

[173] *Id.* at 131.

[174] *Id.* at 131-32. For example, there are numerous references to the power of the eye or the look to control, to maim, even to kill. *Id.* at 132.

[175] JEREMY BENTHAM, THE PANOPTICON WRITINGS (Miran Bozovic ed., 1995) (1787).

[176] Silke Berit Lang, They Impact of Video Systems on Architecture 52 (2004) (unpublished Ph.D. thesis, Swiss Federal Institue of Technology Zurich), *available at* http://graphics.ethz.ch/Downloads/Publications/Dissertations/Lan04.pdf.

[177] David Wood, *Foucault and Panopticism Revisited* 1 SURVEILLANCE & SOC'Y 234, 235 (2003).

[178] For its modern application to criminology, *see generally* MIKE MCCAHILL, THE SURVEILLANCE WEB: THE RISE OF VISUAL SURVEILLANCE IN AN ENGLISH CITY (2002).

[179] For a consideration of the use of panopticism in information technology, *see generally* Oscar H. Gandy, Jr., *The Surveillance Society: Information Technology and Bureaucratic Social Control*, 39 J. COMMUNICATION 61 (1989), *reprinted in* THE INFORMATION GAP: HOW COMPUTERS AND OTHER NEW COMMUNICATION TECHNOLOGIES AFFECT THE SOCIAL DISTRIBUTION OF POWER 61 (Marsh Siefert et al. eds., 1989); in economics and politics, *see generally* Kevin Robins & Frank Webster, *Cybernetic Capitalism: Information, Technology, Everyday Life*, *in* THE POLITICAL ECONOMY OF INFORMATION 44 (Vincent Mosco & Janet Wasko eds., 1988); to sociology of the workplace, *see* SHOSHANA ZUBOFF, IN THE AGE OF THE SMART MACHINE: THE FUTURE OF WORK AND POWER (1988); to power relationships, *see generally* NICK DYER-WITHEFORD, CYBER-MARX: CYCLES AND CIRCUITS OF STRUGGLE IN HIGH-TECHNOLOGY CAPITALISM (1999); MARK POSTER, THE MODE OF INFORMATION: POSTSTRUCTURALISM AND SOCIAL CONTEXT ch. 3 (1990).

[180] I observed in many cases that courts chose these constructions to describe what would otherwise be lovers or boyfriend, thereby either depersonalizing the relationship and rendering it static or eroticizing the relationship and rendering it lurid. Some scholars have described such discussions as

surveillance discourse, "the bodily aspects become the ultimate decisive factor in determining who one is."[181]

The court essentially states that to the eyes of watchers—the children and society–Mrs. Burris does no wrong. Even if, as the court states, her husband accuses her of "open and notorious . . . fornication," and even given the voice of a lone judicial dissenter who echoes the charge of fornication,[182] this claim is diminished by the extent to which Mr. Weston steps into the role of father, effectively usurping the role of the natural father. By providing for the mother and her children economically, the mother's lover re-appropriates the mother's sexual conduct to the private space of home.

V. CONCLUSION—LOVE, LUCK, OR MONEY?

Scholars across disciplines have queried the extent to which and whether economic resources affect decisions to marry and divorce.[183] Scholars have shown that for married couples, an increase in resources can either make married couples more stable in their relationships, or, alternatively, can enable divorce by allowing the couple to address the costs associated with divorce.[184] In *Burris*, morality would seem to be closely tied to the mother's eucatastrophe—her reinvention as a good mother in middle-class social and economic surroundings. In *Burris* the mother sought and obtained the social and legal autonomy necessary to claim both an independent intimate life *and* the custody of their children. This suggests that mothers can be constructed as powerful within the milieu of the family and in their own personal regimes.

It may, however, be troubling to some that the phenomenon of power arising here is partially drawn from a discursive representation of motherhood that serves to perpetuate the construction of motherhood as central to womanhood. The mother, though she "wins" (retains custody of her children), ultimately submits to a construct of womanhood that essentially renders her in thrall to her children, her new intimate partner,

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voyeuristic discourses. *See generally* CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE (2000). A voyeuristic discourse can be a sexually charged discourse of watching or of vicariously enjoying the intimacies of others. *Id.* at 49. Such discourses may be used for a number of purposes. One purpose is to demean the subjects by subjecting them to a discursive public undressing. *Id.* at 49-50. Another purpose is to shock and energize readers into recoiling from the subjects. *See id.* at 16 (arguing that certain voyeuristic discourses in modern society occur because of a "need [for the observer] to feel superior to or more fortunate than [the subject]").

[181] Matthijs Kouw, Lizette Pater & Edo Schreuders, *No Fear or Hope But New Weapons: A Deconstruction of Privacy*, 1 ETHICOMP E-J. 1, 8 (2004).

[182] Burris v. Burris, 388 N.E.2d 811, 816 (Ill. App. Ct. 1979) (Jones, J., dissenting).

[183] *See, e.g.*, Hoekstra & Hankins, *supra* note 88 (economic analysis of the role of an "income shock" (lottery winnings) on marriage and divorce); *see generally* Marianne P. Bitler et al., *The Impact of Welfare Reform on Marriage and Divorce*, 41 DEMOGRAPHY 213 (2004).

[184] *See generally* Hoekstra & Hankins, *supra* note 88 (manuscript at 2).

and her home. This may serve to reinforce an uncritical adherence to traditional social patterns of assigning caretaker roles to women.